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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 4971

In the Matter of the Petition of the City of Detroit for the Vacation of Certain Plats, Streets and Alleys

MICHIGAN BELL TELEPHONE COMPANY,
Appellant

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT AND APPENDICES

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MICHIGAN BELL TELEPHONE COMPANY,
Appellant

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

The Appellant, Michigan Bell Telephone Company, a Michigan Corporation, appealed from the final judgment of the Supreme Court of Michigan reversing a judgment of the Circuit Court for Wayne County, Michigan, which judgment of reversal the Supreme Court of Michigan entered February 2, 1965, and denied a timely petition for rehearing on March 1, 1965. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise such jurisdiction in this case.

OPINIONS BELOW

The opinion of the Circuit Court for the County of Wayne, State of Michigan, is not reported and a copy of the opinion is attached hereto as Appendix "A", and a copy of the final Order is attached hereto as Appendix "B".

The Opinions and Judgment of the Supreme Court of Michigan are reported under the title *"City of Detroit v. Michigan Bell Telephone Company"* in 374 Michigan 543; 132 N.W. 2d, 660, and copies thereof are attached hereto as Appendix "C".

JURISDICTION

(i)

The proceeding was brought by the City of Detroit in the Circuit Court for Wayne County, Michigan. It was a statutory proceeding by which the City sought to vacate certain streets and alleys within the boundaries of an area which was the subject of a development plan. The Statute under which the City proceeded is Act No. 172, P.A. 1929, Sects. 59 to 68, inclusive, as amended by Act No. 101, P.A. 1958, being Michigan Compiled Laws 560.59 to 560.68 inclusive; Michigan Statutes Annotated 26.489 to 26.498, inclusive.

(ii)

The judgment of the Michigan Supreme Court sought to be reviewed was made and entered February 2, 1965. Motion for rehearing was denied March 1, 1965. Notice of appeal was filed May 26, 1965, in the Circuit Court for Wayne County, Michigan, that being the Court in possession of the record.

(iii)

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment of the Michigan Supreme Court under the provisions of 28 U.S.C. 1257(2).

(iv)

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment:

Louisville v. Cumberland Tel. & Tel. Co., 224 U.S. 649, 56 L. Ed. 934, 33 S. Ct. 649;

Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 57 L. Ed. 1389, 33 S. Ct. 988 (1913);

Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 57 L. Ed. 1400, 33 S. Ct. 997;

Russell v. Sebastian, 233 U.S. 195, 58 L. Ed. 912, 34 S. Ct. 517 (1914);

Los Angeles v. Los Angeles Gas & Electric Co., 251 U.S. 32, 64 L. Ed. 121, 40 S. Ct. 76 (1919).

(v)

There is in question here, the validity of a state statute as the state court has construed it. Such statute is Act 172 Mich. P.A. 1929, Sections 59-68 as amended, being C.L. 560.59-560.68, M.S.A. 26.489-26.498.

QUESTIONS PRESENTED

First

Is a state statute constitutional within the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States when construed and applied to authorize a city under the guise of its police power to eliminate and destroy without com-

pensation a public utility's vested property rights in the franchised use of a public street or alley in order to facilitate the replatting of that street or alley together with adjoining lands as an urban renewal project when:

1. Title to adjoining property (real estate lots) but not the property of the utility was acquired by exercise of the power of eminent domain; and

2. Each city-owned utility (but not other utilities) has been compensated for the costs of removing and relocating utility equipment from said streets and alleys?

The state statute in question (Mich. Pub. Acts 1958, No. 101; Mich. Comp. Laws §560.62 (Supp. 1961), Mich. Stat. Ann. §26.492), provides that in the vacation of a street, alley, or other public place then being used by any public utility for public utility purposes, it is "deemed necessary for the health, welfare, comfort and safety of the people" for the Circuit Court to reserve an easement for the use of public utilities; the Michigan Supreme Court construed the statute to mean that under the facts of the case the Circuit Court had the duty not to reserve an easement and had no authority to provide for any compensation or reimbursement to a utility company occupying a street or alley under a vested franchise right.

Second

When a city has no legal authority to bring about rehabilitation of blighted areas except under and by virtue of the Michigan Urban Renewal Statute (Mich. Pub. Acts 1945, No. 344; Mich. Comp. Laws §125.71, Mich. Stat. Ann §5.3501), is such state statute constitutional within the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States when construed and applied to authorize a city

under the guise of its police power to eliminate and destroy without compensation a public utility's vested property rights in the franchised use of a public street or alley in order to facilitate the replatting of that street or alley together with adjoining lands as an urban renewal project when:

1. Title to adjoining property (real estate lots) but not the property of the utility was acquired by exercise of the power of eminent domain; and

2. Each city-owned utility (but not other utilities) has been compensated for the costs of removing and relocating utility equipment from said streets?

The Urban Renewal Statute provides in part:

(a). By Sec. 3 that a municipality "is hereby granted the power to bring about the rehabilitation of blighted areas * * *, and for that purpose *to acquire real property by purchase, gift, exchange or condemnation* * * *" (emphasis supplied): and

(b) By Sec. 2 that "Real Property shall include lands, buildings, improvements * * *, and any and all *easements, franchises* and hereditaments, corporeal or incorporeal, and every estate, interest, privilege, *easement, franchise and right therein* * * * legal or equitable, *including rights of way* * * *" (emphasis supplied); and

(c) By Sec. 4c that "the plan shall designate the * * * *estimated costs of improvements contemplated for the area;* and may include any or all the following *improvements* * * * *locating or relocating water mains, sewers or other public or private utilities;* * * *" (emphasis supplied).

Third

Are the vested property rights of a public utility taken within the meaning of the due process guarantee of the Fourteenth Amendment to the Constitution of the United States by an uncompensated ouster of its facilities from and destruction of its property rights in a public street or alley in order to facilitate the replatting of that street or alley together with adjoining lands as an urban renewal project when:

1. The public utility is bound to serve the public and is entitled to maintain and for many years, continuously since 1907, in fact, has maintained its facilities in the streets and alleys in question pursuant to state franchise (Mich. Pub. Acts 1883, No. 129; Mich. Comp. Laws §484.4, Mich. Stats. Ann. §22.1414); and

2. Admittedly, the city is not acting for the purpose of regulating the use of the streets, as contemplated by *New Orleans Gaslight Co. v. Drainage Commission,* 195 U.S. 453 (1905) but seeks to completely oust Appellant from the streets and destroy its property rights without condemnation or compensation.

Fourth

Is a public utility denied equal protection of the laws within the meaning of the equal protection guarantee of the Fourteenth Amendment to the Constitution of the United States by an uncompensated ouster of its facilities from and destruction of its property rights in a public street or alley in order to facilitate the replatting of that street or alley together with adjoining lands as an urban renewal project when:

1. The public utility is bound to serve the public and is entitled to maintain and for many years, continuously since 1907, in fact, has maintained its facilities in the streets and alleys in question pursuant to state franchise (Mich. Pub. Acts 1883, No. 129; Mich. Comp. Laws §484.4, Mich. Stats. Ann. §22.-1414); and

2. Each city-owned utility (but not other utilities) has been compensated for the costs of removing and relocating utility equipment from said streets?

STATEMENT OF THE CASE

The substantive facts were stipulated by the parties in interest.

In 1957 the City of Detroit acting under Act 344, P.A. 1945, as amended (C.L. 1948, 125.71, M.S.A. 5.3501) undertook the rehabilitation of an area within its boundaries containing approximately 73 acres of land and approximately 424 structures. The project involved acquisition by the City of the land, demolition of the structures, the vacation of certain plats, streets and alleys, and the elimination of utilities and easements therein.

In 1957 the City entered into a "Loan and Grant Contract" with the federal government for financial aid and assistance in carrying out the rehabilitation of the area under Title I of the Federal Housing Act of 1949, as amended, pertaining to urban renewal. Under the terms of the City's contract, the federal government contributes two-thirds of the net cost and the city contributes one-third of the net cost.

Continuously since 1907, Michigan Bell, pursuant to right granted by Section 4 of Michigan Telephone Act 129, P.A.

1883, as amended, has installed and maintained its telephone facilities in the streets and alleys within the area which the City determined to redevelop.

It is stipulated:

(1) that the telephone facilities of Michigan Bell in the streets and alleys did not interfere with said streets and alleys in question as such;

(2) that said telephone facilities served the area being redeveloped and the area beyond; and

(3) that Michigan Bell, as a public utility, has a legal duty to continue to serve the subscribers beyond the area involved, as well as those who may move into the area when redeveloped. To meet this duty, Michigan Bell had to continue to occupy the streets and alleys located within the redevelopment area with its telephone facilities, or, instead, remove, reroute and relocate its facilities.

Having determined to redevelop the area, the City, in 1957, proceeded by condemnation proceedings to acquire all the property embraced within the area. No attempt was made by the City to acquire or condemn the property interests of either Michigan Bell or Detroit Edison. Neither Michigan Bell nor Detroit Edison was a party to the condemnation proceedings and neither received any legal notice thereof.

The Act under which the City proceeded with the condemnation (Act 344 of 1945, as amended, C.L. 125.71; M.S.A. 5.3501) provides in Section 4 that the Development Plan shall designate the "estimated cost of the improvements" and then further provides that such estimated cost may include (among other things) "locating or relocating water mains, sewers or other public or private utilities." The

Development Plan as written up by the City *included the cost of relocation of city-owned utilities but no others.* (emphasis supplied)

PROCEEDINGS TO VACATE STREETS AND ALLEYS

The City, having failed to make Michigan Bell and Detroit Edison parties to the condemnation proceedings whereby it acquired title to all the other privately owned property in the area, brought this proceeding under the *Plat Act,* being Act 172 of 1929, as amended, C.L. 560.59-560.68; M.S.A. 26.489-26.498, seeking the vacation of certain streets and alleys located within the boundaries of the area covered by the Development Plan. The Plat Act provides in Section 62, second sentence, that if any street or alley being vacated is "being used by any public utility for public utility purposes," the Court is authorized "to reserve an easement therein for the use of public utilities," and such reservation is by the Act "deemed necessary for the health, welfare, comfort and safety of the public." In the proceeding as filed, the City proposed to reserve such an easement in one block only, namely, "Tenth Street between Abbott and Howard."

Appellant, Michigan Bell Telephone Company, pleaded the Federal question in paragraph 3 of its answer to the City's Amended Petition and set forth the issues in the Stipulations with the City under the heading "Issues and Position of Parties." The City contended it was entitled to force the removal of poles, etc. by appellant at appellant's own cost and expense and without any compensation to appellant. Michigan Bell, appellant, contended that it was entitled to easements reserved, and if it was forced to remove its poles, etc. from the streets and alleys in question, the City was taking the property rights of appellant

and therefore must give just compensation; and that any different construction of the Act under which the City was proceeding would render the statute unconstitutional as impairing the obligation of contract, depriving appellant of property without due process, and taking property for public use without just compensation.

AGREED REMOVAL OF UTILITIES WITHOUT PREJUDICE

To avoid delay to the City's program, it was determined that the telephone facilities of Michigan Bell should be removed, without prejudice, from the streets and alleys in question, which were to become parts of industrial lots sold by the City to private third parties. The facilities were relocated and the parties agreed that the cost of relocation (nonbetterment) would be paid to the utilities if they should prevail. This was done in accordance with an order of the Circuit Court and the case was set down for trial and determination on the merits. Thereafter, the case was tried and the issues determined by the Wayne County Circuit Court as set forth in its Opinion and Final Order from which the City appealed to the Michigan Supreme Court.

THE WAYNE CIRCUIT COURT DECISION

Pursuant to Stipulation and Agreement between the City and appellant an "Order of Vacation" was entered June 18, 1959, without prejudice to the rights and contentions of the parties. The issues were submitted to the Circuit Court upon an agreed statement of facts and briefs. On May 10, 1962, the Court rendered its opinion in favor of appellant, holding that appellant's franchise was a vested property right, that the City's proposed ouster of appel-

lant from the streets and alleys was not a reasonable exercise of police power; and that failure to provide compensation or to reserve an easement would be an unconstitutional impairment of contract oblibgation and a denial of due process. A Final Order was entered pursuant to the Opinion on June 21, 1962. The Opinion of the Wayne Circuit Court is appended hereto.

THE MICHIGAN SUPREME COURT DECISION

The City of Detroit appealed to the Supreme Court of Michigan where the issues were argued before the Supreme Court on November 7, 1963. The Federal questions were presented in briefs filed and in the oral argument. The case was decided February 2, 1965, by seven of the eight justices who heard the arguments. The decision was by a vote of four for reversal and three for affirmance of the Circuit Court's judgment.

The minority of the Court voting for affirmance of the judgment below followed the trial court's reasoning. The majority voting for reversal held that appellant had vested property rights, subject to reasonable exercise of police power; that the uncompensated ouster of the utilities from the streets and alleys was a reasonable exercise of police power; and that the statute's provision for easement reservation was not mandatory. The opinion is not clear. Copies of the two opinions are appended hereto.

Appellant filed a timely motion for rehearing which was denied on March 1, 1965. Thereupon this present appeal was taken.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In their decisions the circuit judge and the Michigan Supreme Court justices agreed that appellant's state franchise under the Michigan Telephone Act 129, P.A. 1883, as amended, constituted a vested property right protected by constitutional guarantees. This was in accord with precedent established in *City of Lansing v. Michigan Power Company*, 183 Mich. 400, 410-411; 150 N.W. 250, 253 (1915); *Village of Constantine v. Michigan Gas and Electric Co.*, 296 Mich. 719, 731; 296 N.W. 847, 852 (1941); *Louisville v. Cumberland Tel. & Tel Co.*, 224 U.S. 649, 661 (1912); *Russell v. Sebastian*, 233 U.S. 195, 204 (1914).

However, a majority of the Michigan Supreme Court (4-3 decision reversing the Michigan Trial Court), by way of construing a Michigan statute, necessarily ruled that this vested property right to occupy the streets and alleys in question was not violated by an uncompensated ouster of Appellant's facilities therefrom to make way for an urban renewal project.

Appellant recognizes that its vested property right to occupy the streets and alleys is at all times subject to proper regulation under the police power, e.g., safe erection of poles or wires, accommodating highway repairs and improvements. However, Appellant contends that proper police power regulation is not involved in this case. In the first place, Appellant's easement is not being regulated—it is being destroyed. In the second place, the City here is not acting for the purpose of regulating the streets and alleys. Thus, *New Orleans Gas Light Co. v. Drainage Commission*, 195 U.S. 453 (1905), has no application here. On the contrary, the City seeks to oust completely Appellant from the streets and alleys in question without com-

pensation not for a street purpose but, rather, for the purpose of rehabilitating a blighted area.

The Michigan Supreme Court had consistently held that:

> "Where property is taken for public health and safety, *it cannot be taken without compensation, and there is no distinction between the power of eminent domain and the police power in this regard.* Russell, Police Power of the State, p. 86. In this case the legislation involved is upheld under the police power of the state. But if private property is to be taken for the purpose of carrying out the project in question such property may be acquired against the will of its owner only by the exercise of the power of eminent domain." *In re Brewster Street Housing Site,* 291 Mich. 313, 342 (1939). (Emphasis added.)
>
> Reference also, *Michigan Bell Telephone Company v. Benton Harbor,* 121 Mich. 512, 516-7 (1899); *City of Lansing v. Michigan Power Co.,* 183 Mich. 400, 410-1 (1915).

Other cases which support this basic constitutional principle are the following:

Louisville v. Cumberland Tel. & Tel. Co., 224 U.S. 649, 661 (1912);
Russell v. Sebastian, 233 U.S. 195, 204 (1914);
U.S. v. Brooklyn Union Gas Co., 168 F. 2d 391 (2d Cir., 1948);
In Re Gillen Place, 304 N.Y. 215, 106 N.E. 2d 897, 900-902 (1952);
Arkansas State Highway Comm'n. v. Arkansas Power & Light Co., 330 S.W. 2d 77 (Ark., 1959).

By its majority decision the Michigan Supreme Court has gone far beyond what heretofore has been considered

proper regulation under the police power. It has approved, as constitutional, the right of the City to accomplish uncompensated ouster against appellant while at the same time compensating its own water and electric utility operations. Such increases the magnitude of the due process and contract clause violations (*Bolling v. Sharp*, 347 U.S. 497, 499 (1954)) and creates discrimination resulting in denial of equal protection of the law. *Nashville, C. & St. Louis Ry. v. Walters*, 294 U.S. 405, 429 (1935); *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958).

Appellant recognizes that slum clearance and urban renewal are legitimate and desirable activities of government. It contends that such activities must be accomplished only by constitutional means. And Mr. Justice Holmes admonished in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922):

> "* * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change * * *."

There are many slum clearance projects in being and contemplated in appellant's territory, all of which involve the basic constitutional questions involved in this case as well as involving substantial sums of money. Slum clearance and urban renewal projects are prevalent throughout the United States and all involve the relocation of utility equipment. Final determination by this Court of the issues involved is of local and national interest and importance. Such determination would serve to eliminate much confusion and litigation.

WHEREFORE, appellant prays that probable jurisdiction may be noted, the case heard on the merits, and the judgment below reversed.

Respectfully submitted,

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Dated: August 19, 1965.

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APPENDICES

APPENDIX "A"

Opinion of the Circuit Court for Wayne County, Michigan (Rendered May 10, 1962)

The issues in this case are framed from an agreed stipulation of facts. They are as follows:

Undertaking to redevelop an area within its corporate boundaries designated as "West Side Industrial Project, UR Mich. 1-4," the City of Detroit hereinafter referred to as the City, on July 9, 1957, through its common council and pursuant to the provisions of Act 344 of P.A. 1945 as amended by C.L. 1948, 125.71 et seq., which authorizes the rehabilitation of blighted areas and prescribes the method of accomplishment, adopted and approved a redevelopment plan and directed the institution of the necessary condemnation proceedings. The estimated net cost of the project after deduction of the estimated proceeds from the private sale of some of the land was $5,221,000.00. On November 14, 1957 the City entered into a Loan and Grant Contract with the United States Government pursuant to Title I of the Federal Housing Act of 1949 whereby the Government would assist in financing the project by contributing two-thirds of the net cost to the City's one-third. It is pertinent to note the Federal Regulations, Urban Renewal Manual, Book I, Section 11-1-2 provides, "Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the Company is required under applicable State and Local law. If the L.P.A. (Local Public Agency—in this case the City) is required to compensate the utility company for proposed changes, the necessity for making the

changes and the basis used in computing the estimated amount of such compensation shall be described. A legal opinion as to the obligations of the L.P.A. to provide the compensation indicated shall be provided with Part I of the application for loan and grant." The removal or relocation costs of the utility lines of private utilities was not included in the application although such costs for municipally owned utilities (public lighting and water) were included. The development plan of rehabilitation called for, among other things, the vacation of certain plats, streets and alleys, and the rerouting of certain utilities to other streets and alleys. The respondents, Michigan Bell Telephone Company, hereinafter referred to as Bell, and the Detroit Edison Company, hereinafter referred to as Edison, maintained installations in certain of the streets and alleys which were to be vacated. The City successfully completed its condemnation proceedings to which neither Bell nor Edison were named as parties. On February 20, 1959 the instant vacation proceedings were instituted in accordance with the provisions of the Plat Act, Act 172 P.A. 1929 as amended by C.L. 1948, 560.1 to 560.79 inclusive, which provides for the altering and vacating of plats and among other things, the reservation of easements for utilities in vacated streets and alleys. Both Bell and Edison appeared and objected insofar as the proposed vacations affected streets and alleys in which their installations were located, unless easements were reserved for them in these same streets and alleys or unless the City agreed to bear the cost of the removal and relocation of their installations to the new areas to be designated in the redevelopment plan. It should be noted that although the installations of each utility were differently located, the legal principles

involved are the same. A controversy developed and on June 18, 1959 pursuant to an understanding between the parties which recognized and preserved the right to further judicial determination, an order of vacation was entered by the Hon. Robert M. Toms, this Court's predecessor, which contained the following provisions; "Provided, however, that there is hereby reserved in the streets and alleys above described, for the use of public utilities, easements for the maintenance of the utility poles, wires and equipment as presently located; provided always that this paragraph of this order is interlocutory and is subject to further final order, to be entered after the proofs and argument." Following the entry of this Order the facilities of both Bell and Edison were removed by agreement. Bell has maintained installations in this area since 1907 pursuant to Act 129 P.A. 1883 as amended by C.L. 1948, Sec. 484.1. to 484.10 inclusive, which provides further that its installations serve not only this area but the areas beyond. Similarly Edison has maintained facilities serving this area and areas beyond as authorized and required by the properly and legally adopted ordinances of the City of Detroit. The Development plan for rehabilitation involves some 73 acres of land containing some 424 structures, which land has to be acquired and the structures demolished. It provides for street widening and paving, installation of walks, sewers and water mains, creation of a public park, rezoning, vacation of certain plats, streets and alleys, rerouting of utilities and the sale of large portions of the land to private persons and corporations for light industrial and commercial uses. It is agreed that the non-profit, non betterment costs of removal and relocation amounts to $11,305 in the case of Bell and $1,746.36 in the case of Edison. The City contends that the utilities pay these costs. The utilities contend that the City should pay. All parties have filed comprehensive and exhaustive briefs

which this Court has carefully reviewed. They discuss several pertinent issues. Among them are those concerning whether or not these utility franchises are property rights protected by constitutional guarantees, whether the City is engaging in a governmental or a proprietary function, whether it makes any difference insofar as the payment of compensation for installation relocations is involved, whether the existing statutes authorize and require the reservation of easements, whether compensation must be paid if the utilities are forced to surrender these statutory rights, whether the payment of compensation under these circumstances is the use of public funds for private purposes and prohibited by the Michigan Constitution, the extent of the City's regulatory police power, whether the City's regulatory police power over streets and highways is limited to "primary user" and does not exceed regulatory power to merely safeguard the right of travel, whether the complete extinguishment of the franchise or easement, instead of a relocaton within the limits of the same streets or alleys, involves the taking of property which requires compensation, whether the "old rule" is inequitable because of changed conditions, whether the City's request is a reasonable one and whether the Federal legislation and the background thereof contemplates payment for utility installation relocations.

Some of these questions are collateral to and can be discussed in conjunction with those which are major and controlling. In an effort to promptly cut through to the very core of the controversy the Court proposes the following controlling issues which can be succinctly stated as follows:

I. Is the City here engaged in a governmental or a proprietary function?

II. Is a utility franchise a vested property interest?

III. When engaged in a governmental function, what are the limitations on the City's right to exercise its police power over private property?

IV. Is what the City proposes here a valid exercise of regulatory police power, or is it an unconditional taking of property?

These issues will be discussed seriatim.

I. There is little question concerning this issue. Even the respondents are not overly enthusiastic in their contention that the City's redevelopment of the area in question is proprietary and not governmental. Their principal argument is founded in the premise that because the greatest part of the area to be redeveloped is to be resold to private purchasers that the function then becomes proprietary. See Trenton v. New Jersey, 262 U.S. 182, 67 L. Ed. 937 (1923); Vilas v. Manila, 220 U.S. 345, 55 L. Ed. 491, 31 S.C. 416 (1911); Illinois Trust and Savings Bank v. Arkansas City, 76 Fed. 271 (1896); Andrews v. South Haven, 187 Mich. 294 (1915). In the light of more recent decisions the respondents' contention in this regard is not tenable and all of their arguments based upon their right to compensation when the City is engaged in a proprietary function necessarily fall with it.

In support of the City's position see Act 344 Sec. 1, M.S.A. 5.3501 supra; 44 A.L.R. 2d on pages 1418, 1419 (1955); Wilson v. Long Branch, 27 N.J. 360, 142 A. (2nd) 837 (1958); Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); Miller v. City of Louisville, 321 S.W. (2nd) 237 (1959); In re Slum Clearance, 331 Mich. 714 (1951); Rabinoff, et al v. District Court, et al., 360 P. (2nd) 114 (1961); Redevelopment Commission of Greensboro, et al., v. Security National Bank of Greensboro, 114 S.E. (2nd) 688 (1960).

Ample pertinent judicial pronouncements appear in all of these authorities. It is unnecessary to quote from them. It is the finding of this Court that in engaging in this

project of redevelopment the City, under its police power, is benefiting the health, welfare, safety and morals of the community and is performing a proper governmental and not a proprietary function.

II. McQuillin on Municipal Corporations, Sec. 34.03, pages 14, 15 states, "When granted a franchise becomes property in the legal sense of the word, by virtue of a contractual right, and it is termed an incorporeal hereditament, though separate and distinct from the property necessary in it use and exercise" (see citations thereunder). "A franchise, whether general or special is generally considered as property, and it is usually regarded as incorporeal property in the nature of an incorporeal hereditament." Fletcher Cyclopedia Corporations, Permanent Edition, P. 2864 (see citations thereunder). "It is too well settled to admit of controversy that a franchise is a contract." Fletcher supra, P. 2866 (see citations thereunder). The City appears to contest this proposition (see language of Petitioner's brief on page 10 thereof), "Neither Detroit Edison nor Michigan Bell have purchased any rights in these public streets and alleys, nor do they directly pay for their use of these public streets and alleys." Interestingly enough the corporation counsel of the City of Detroit in the not too dim nor distant past opined otherwise. On March 21, 1921 the Corporation Counsel advised the Board of Street Railway Commissioners as follows: "It seems clear, therefore, from the above provisions that the grantee of this ordinance would be operating a public utility and that by the acceptance of the grant, as provided in Section 26 of the ordinance, a valid contract would be entered into between the City of Detroit and the Detroit Service—At—Cost Railway, which contract would be a franchise." (Page 108, 110, Opinions of the Corporation Counsel, City of Detroit.) On July 7, 1930 the Corpora-

tion Counsel advised the Common Council as follows: "a franchise is a contract granting certain rights for a period of years * * *." (Vol. III. Opinions of Corporation Counsel for the City of Detroit.)

In entertaining an action for declaratory judgment the Court said on page 79 in Arkansas State Highway Commission v. Arkansas P. and L. Co., 330 S.W. (2nd) 77, (1959) (rehearing denied 1-11-60),

"1. There is no question but that under the franchise the company owns a property right: In 18 Am. Jur., 790, it is said, 'Contract rights and franchises—When contract rights are taken for public use, there is a constitutional right to compensation in the same manner as when other property rights are taken. A franchise which constitutes a binding contract is property in the constitutional sense. The fact that the franchise relates to the public use does not entitle the state to abrogate it without compensation, for a franchise is the private property of even a public service corportaion.'

In Southern Bell Telephone and Telegraph Co. v. City of Mobile, CC. 162 Fed. 523, 528, 532, 5 Cir., 174 F. 1020, 'A right of way upon a public street, whether granted by Act of the Legislature or ordinance of a city council, is an easement and as such is a property right entitled to all the constitutional protection afforded other property and contracts.' In National Gas and Fuel Corp. v. Norphlet Gas and Water Co., 173 Ark. 174, 294 S.W. 52, 55; Again in City of Louisville v. Cumberland Telephone and Telegraph Co., 224 U.S. 649, 32 S. Ct. 572, 56 L. Ed. 394, it was held that the right to use streets in a city for the purpose of a public utility has been called by various names—incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property.

This principle has been recognized and applied by this Court in Clear Creek Oil and Gas Co. v. Ft. Smith Spelter Co., 148 Ark. 260, 230 S.W. 897."

In Dept. of Highways of the State of Louisiana v. S. Western Electric Power Co., Sup. Ct. of Louisiana, No. 45,999, decided January 15, 1962 the Court expressed itself as follows: "These franchises are privileges bestowed by the City on the respective utilities for a consideration and the exercise of those privileges necessarily involved the use of the property of the City in the manner designated by the authority creating those privileges. The privileges, uncommon rights thus bestowed, together with the right to the use of the City property which is indispensable to those privileges, constitute a valuable property right of the utilities which under fundamental guarantees cannot be taken or damaged, except for public purpose and after just and adequate compensation is paid. The right once created and accepted cannot be altered, hindered or otherwise impaired, without the consent of the utilities."

Michigan has repeatedly held that a franchise constitutes a contract and a property right. See Kibbie Tel. v. Lanphere, 151 Mich. 309 (1908); City of Lansing v. Mich. Power Co., 183 Mich. 400 (1914); Village of Constantine v. Michigan Gas and Electric Co., 296 Mich. 719 (1941); Report of Atty Gen. of Michigan, Vol. 1-1957-1958, No. 2739. On page 112 of the Attorney General's opinion: "A franchise is a contract and rights thereunder are vested rights, contractual in nature, and within the purview of the constitutional prohibition against the impairment of the obligation of contracts. The conditions upon which a franchise is granted constitute the considerations for the contract * * *."

See also Traverse City v. Consumers Power Co., 340 Mich. 85, (1954). See also authorities cited by this Court under discussion of issue No. 4.

It is obviously fundamental and generally recognized and this Court holds that the respondents' franchises in the instant case are vested property rights subject to reasonable police power regulations limited by constitutional guarantees.

III. Having held that a utility franchise is a vested property right, the consequential question arises which concerns itself with the limitation of the City in the exercise of its police power to interfere with that right. Numerous authorities have been cited by counsel in support of their respective contentions, but aside from the factual differences in each case it appears to be generally recognized that under its police power the City has the right to regulate property and contract rights so long as such regulations are reasonable and necessary to safeguard the health, welfare, safety and morals of the community. Such is the rule set down in New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 195 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831; New York Tunnel Authority v. Consolidated Edison Co., 68 N.E. (2nd) 445; Detroit Edison Co. v. Detroit, 332 Mich. 348; Michigan Bell Telephone Co. v. City of Detroit, 332 Mich. 355; Scranton Gas and Water Co. v. City of Scranton, 214 Pa. 586, 64 A. 84; Transit Commission v. Long Island R. Co., 171 N.E. 565; State v. Idaho Power Co., 346 P. 2nd 596; In re Gillen Place, 106 N. E. 2nd 897; and numerous others.

Quoting from New Orleans Gaslight Co. v. Drainage, supra; "The Gas Company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the

risk that they might be at some future time disturbed, when the state might require for a necessary public use that changes in locations be made.

This right of control seems to be conceded by the learned counsel for plaintiff in error, insofar as it relates to the right to regulate the use of the surface of the streets and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power."

In New York Tunnel Authority, supra, the Court repeated the principle "All these cases are to the point, that these public services corporations maintain their rights in the streets, subject to reasonable regulation and control and are bound to relocate their structures at their own expense whenever the public health, safety or convenience requires the change to be made."

See also Chicago, Burlington and Quincy R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979; Chicago, Burlington and Quincy R. Co. v. Illinois, 200 U.S. 561, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; Lake Shore and Michigan Southern R. Co. v. Clough, 242 U.S. 375, 37 S. Ct. 144, 61 L. Ed. 374; Chicago, Milwaukee and St. Paul R. Co. v. Minneapolis, 232 U.S. 430, 34 S. Ct. 400, 58 L. Ed. 671; National Water Works Co. v. City of Kansas, CC., 28 F. 921; Matter of Petition of Deering, 93 N.Y. 361; Chace Trucking Co. v. Richmond Light and R. Co., 225 N.Y. 435, 122 N.E. 210.

This is the rule and this Court subscribes to it.

IV. In passing on the fourth issue we enter into an area where the parties are in complete disaccord. The City contends that its action is regulatory only and is a proper, reasonable and valid exercise of its police power

and that it is not an infringement upon any of the constitutional guarantees of the respondents. The utilities contend otherwise, maintaining the position that what the City is doing here is not regulating, but rather under the guise of police power regulation is terminating, abrogating and taking the franchises, vested property rights, in violation of Art. II, Sec. 9 (impairment of contracts) and Art. XIII, Sec. 1 (Eminent Domain) of the Constitution of the State of Michigan and in violation of Art. I, Sec. 10 (Impairment of Contracts) and Amendment Article XIV, Sec. 1 (due process) of the United States Constitution. An analysis of the opposite positions requires a most careful look at the applicable law and particularly the refinements therein embodied. In support of its position the City relies in part upon the New Orleans Gaslight case, supra, in which the utility was denied recovery of the cost of relocating its lines in public streets. A cautious look at this case, however, indicates distinguishing features from the case at bar. In the New Orleans case there was a relocation in the same street with as little interference as possible. "It was found necessary to change the location in some places in the streets of the City, of the mains and pipes theretofore laid by the New Orleans Gaslight Company. The testimony shows that there was nothing to indicate that these changes were made in other than cases of necessity and with as little interference as possible with the property of the gas company." Here we have a different situation. Here we have a complete vacating of the streets and alleys where the installations are laid, not just a change of location within the street. Here we have a termination of all rights under the franchise. The City also relies upon New York Tunnel Authority v. Consolidated Edison Co., supra. In this case the right to use the streets was not taken. It was merely a relocation because grades were changed and street lines altered. Again in De-

troit Edison Co. v. Detroit, supra, the facts were dissimilar. Here was involved only a temporary removal of poles and wires and a subsequent replacement to permit the construction of a sewer. It did not involve the issues we are here confronted with, that is, the complete elimination of the installations in the street and a permanent removal thereof. Michigan Bell Telephone Co. v. Detroit, supra, was a companion case in which "the material facts and the easements involved are the same.". In Scranton Gas and Water Co. v. City of Scranton, 64 A. 84, the situation was likewise different. Here again was the construction of a viaduct to avoid a dangerous grade crossing. "The viaduct in no way interfered with them in place." There was no relocation involved here but rather expense resulting from the construction of additional connections. In Delaware River Port Authority v. Pa. Public Utility Commission, 145 A. (2nd) 172, the question with which we are here concerned was not answered. This involved the interpretation of a statute in an effort to allocate expenses of relocating facilities of a non-transportation utility. The City also injects the proposition that it has no authority to pay the cost of relocating the facilities of a public utility without express legislative permission or direction and further, that to do so, possibly even under legislation, would violate Art X, Sec. 2 and Art VIII, Sec. 25 of the Michigan Constitution prohibiting the collection of funds and the use of the credit of the State for private purposes. Numerous authorities are cited in support of and against this position. In support of it on behalf of the City, see First National Bank of Boston v. Main Turnpike Authority, 136 A. (2nd) 699; Transit Commission v. Long Island R. Co., 171 N.E. 565; State v. Idaho Power Co., 346 P. (2nd) 596. Against it and in support of the respondents' contention see Minneapolis Gas Co. v. Zimmer-

man, 91 N.W. (2nd) 642; Jones v. Burns, 357 P. (2nd) 22; State Highway Dept. v. Del. Light and Power Co., 167 A. (2nd) 27; Hays v. City of Kalamazoo, 316 Mich. 343 and numerous others. The rule is basic and understandable and were this a situation in which the City possessed an indisputable legal right to do as it proposes under the valid exercise of its police power, that then, even by express statutory authority its payment of the relocation costs of a utility could be a mere gratuity and constitutionally questionable. Such however is not the rule where the expenditure of funds is necessary to acquire a property interest to further a public governmental function which is necessary for the health, welfare, safety and morals of the community such as the City contends, and the Court agrees, that this is. If it is the legal obligation of the City, either under the limitations of its police power or by eminent domain, to compensate the utilities under the circumstances in this case, then there is no constitutional provision preventing it as the funds are then utilized for public purposes.'

The respondents place considerable reliance on N.Y. Tel. Co. v. N.Y., 169 App. Div. 310; Postal Tel. Cable Co. v. Pub. Utility Comm., 35 A. (2nd) 535; Arkansas Highway Comm. v. Arkansas P. and L. Co., 330 S.E. (2nd) 77; In re Gillen Place, 106 N.E. (2nd) 897; Hamilton, etc. Traction Co. v. Hamilton and Linwald Transit Co., 69 Ohio St. 402; U.S. v. Brooklyn Union Gas Co., 168 F. (2nd) 391; and numerous others cited which this Court has reviewed. In the case of Brewster St. Housing Site, 291 Mich. 313, the Court in declaring a slum clearance project not unconstitutional said on page 342, "Where property is taken for public health and safety, it cannot be taken without compensation and there is no distinction between the power of eminent domain and the police power in this regard. Russell, Police Power of the State, p. 86. In this case the legis-

lation involved is upheld under the police power of the State. But if private property is to be taken for the purpose of carrying out the project in question, such property may be acquired against the will of the owner only by the exercise of the power of eminent domain." See also Telephone Co. v. Benton Harbor, 121 Mich. 512.

In U.S. v. Brooklyn Union Gas Co., supra, the Court's language is pertinent, "Moreover the law seems to be too well settled for change now that the *taking* of a public franchise is the *taking* of property for which compensation must be paid (italics added.) Monongohela Nav. Co. v. U.S., 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463; Los Angeles Gas and Elec. Corp., 251 U.S. 32, 39, 40 S. Ct. 76, 64 L. Ed. 121; Eighth Ave Coach Corp. v. City of New York, 286 N.Y. 84, 96, 35 N.E. (2nd) 907; Kennebec Water Dist. v. City of Waterville, 97 Me. 185, 54 A. 6, 60 L.R.A. 856; Waukeag Ferry Ass'n v. Arey, 128 Me. 108, 146 A. 10; Montgomery County v. Schuykill Bridge Co., 110 Pa. 54, 20 A. 407; Puget Sound Power and Light Co., 9 Cir., 147 Fed. (2) 953; Orgel on valuation under eminent domain, 1936, P. 213; 29 C.J.S. Eminent Domain P. 106, pp. 913, 914. These cases in general were those of a total taking or destruction of the business of the franchise owner, a situation which appears to have caused somewhat less difficulty of analysis than where the franchise is at most impaired in value or partially taken."

The Court calls particular attention to In Re Gillen Place, supra, which is close in fact to the case at bar, in that it involved a street closing. Here we have a closing or vacating of both alleys and streets. "The rule as to relocation referred to in such cases as New York Tunnel Authority v. Consolidated Edison Co. of New York, supra, has been applied in the past only to situations where there was truly *regulation,* rather than a *taking* by *condemna-*

tion." (Italics here substituted for italics in the opinion.) In each such case the utility was required to relocate, but its *rights in the particular street remained in being* (italics added) the relocation therein being merely to accommodate some street improvement. When a street is closed, however, all rights therein are extinguished 'when regulation becomes destruction it ceases to be regulation.' Eighth Ave. Coach Corp. v. City of New York, supra, 286 N.Y., at page 94, 35 N.E. (2nd) at page 912. In the Eighth Ave. Coach case supra, the Court said on page 913, "A franchise, like other forms of property, is protected both by State, and Federal constitutions against a substantial curtailment or destruction by the Government without fair compensation." Numerous other authorities are cited by the respondents, many of which are general in their discussion of the principles herein involved, each having its own factual differences. The most recent decision supporting the contention of respondents is Dept. of Highways of the State of Louisiana v. S. Western Electric Power Co., supra, (Jan. 5, 1962). Quoting from it, "The identical situation applies in the case at bar. The Department of Highways is destroying—not regulating the poles and wires of the utilities."

Factually then, what do we have in the instant case, to which these decisions are applicable? Is the City here requesting an inconsequential, minor or accommodating relocation of the utilities installations? The answer is obviously no. The fact that the City contends in its brief that it is "not revoking the operational rights of these utilities, nor is the City substituting other utilities in their place and stead. These utilities are being required to accommodate the City in rehabilitating this area by relocating their equipment in other public streets provided by the Development Plan" does not clear the situation. It does not alter

the absolute and obvious fact that the City has vacated or closed the streets and alleys. They have ceased to exist and consequently the utility franchises in these streets and alleys have likewise ceased to exist. They have been abrogated, terminated and ended and the fact that the utilities may be given franchises in other streets and alleys in the area requiring new installations does not transform termination into relocation. What the City has done has an unmistakable air of finality. It requires a complete uprooting and removal of all facilities. It is the end of the franchise contract. It is not reasonable police power regulation. It is the taking of a vested property right without payment of compensation under the guise of police power.

In the unusual and interesting days in which we live there seems to be a growing inclination on the part of government to utilize its police power in a broad manner and to justify its use to acquire those things for which there is a strong public desire. While such objectives may be noble and worthy, and while in a sense they may be beneficial to the community, the unrestricted use of such power is fraught with danger. It can gradually lead to the chipping away and eventual diminishing of personal liberties and property rights—to a weakening of those fundamental constitutional guarantees which are the very life blood of our American governmental processes. As evidenced by a number of the authorities cited in the opinion, there is a trend in that direction—but there there must be limitations—and the Courts must lend a steady hand to avoid those dangers and protect those things which are the basic law of the land.

The language of Justice Holmes in Pennsylvania Coal Co. v. Mahon, 67 L. Ed. p. 322, 260 U.S. 393, 415, 416, 43 Sup. Ct. 158, is interesting and pertinent; "The protection of private property in the fifth amendment presupposes

that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. * * * While this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more, until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not strong enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

There is little question in this case and it is amply supported by precedent, that the City has the right to the reasonable, necessary and valid exercise of its police power in the regulation of its streets and highways for the health, safety and welfare of the public. It must be recognized also, that the constitutional guarantee of the obligation of contracts is not an exact or absolute one. Despite these guarantees, in proper instances, the City may impose regulations which are reasonable and necessary to safeguard the health, welfare, safety and morals of the community, and in such cases contracts may be affected. It would be a deprivation of the sovereign power of the State to place contracts beyond the right to regulate them for the protection of the public welfare, *but this power is limited by constitutional guarantees and protections.* It must be reasonably and necessarily exercised and does not embrace the right to *take* private property without just compensation.

This Court holds that the action of the City in directing the removal of the respondents' utility installations without compensation, under the circumstances in this case,

exceeds the City's authority to exercise its police power and is a violation of the constitutional guarantees of the respondents. It is beyond the scope of regulation. It is an actual taking of private property for which just compensation must be paid. The decision on these issues being controlling, it is unnecessary to discuss the others raised by the parties.

An order may be entered vacating the alleys and streets covered by the petition without the reservation of utility easements, but directing the payment of compensation by the City to the respondents in the amounts previously stipulated.

Edward S. Piggins,
Circuit Judge.

APPENDIX "B"

Final Order of the Circuit Court for Wayne County, Michigan

(Filed June 21, 1962)

At a session of said Court held in the City-County Building, Detroit, Wayne County, Michigan, on the 21st day of June, 1962.

Present: Honorable Edward S. Piggins, Circuit Judge.

The issues between Petitioner, City of Detroit, and Respondents, Michigan Bell Telephone Company and The Detroit Edison Company, as framed by Stipulation dated June 11, 1959, the interlocutory "Order of Vacation" dated June 18, 1959, the Supplemental Stipulation dated July 11, 1961, the record, and by the briefs herein filed, having been submitted to this Court for determination and, after due consideration, the Court having made findings and conclusions as set forth in written Opinion filed herein on May 10, 1962;

Now therefore, it is adjudged and ordered—

(a) That the City of Detroit has no right or power to require Michigan Bell Telephone Company and The Detroit Edison Company to remove their utility equipment from the streets and alleys mentioned in the Order entered herein on June 18, 1959, and thus to extinguish the franchise and property rights of those companies in said streets and alleys, unless said City makes just and adequate compensation for such extinguishment and removal.

(b) That the City of Detroit shall pay to Michigan Bell Telephone Company the sum of $11,305.00, being the amount of compensation stipulated, and that such payment shall be made within twenty days from the date hereof.

(c) That the City of Detroit shall pay to The Detroit Edison Company the sum of $1746.36, being the amount

of compensation stipulated and that such payment shall be made within twenty days from the date hereof.

(d) That upon receipt by them of compensation to be paid as above provided Michigan Bell Telephone Company and The Detroit Edison Company, and each of them, shall file in this Court and cause forthwith a signed acknowledgment of payment.

(e) That the provision of the interlocutory "Order of Vacation" entered June 18, 1959, and reading as follows:

> "Provided, however, that there is hereby reserved in the streets and alleys above described, for the use of public utilities, easements for the maintenance of the utility poles, wires and equipment as presently located; provided always that this paragraph of this order is interlocutory and is subject to a further final order, to be entered herein after proofs and arguments."

shall, upon payment of the compensation as above provided and the filing of signed acknowledgments aforesaid, be and is hereby automatically cancelled, annulled and thereafter shall be of no further force and effect, all without the further order of the Court.

(f) That upon payment of the compensation aforesaid, if the City of Detroit so requests, Respondents, and each of them, shall execute and deliver to the City of Detroit forthwith a quit claim deed of their respective interests for which compensation was paid as above provided, and that in the event the City of Detroit does not request such deeds or if Respondents or either of them fail to execute and deliver such deed upon request, then this Order shall stand in lieu thereof with the same force and effect as if said deeds had been executed and delivered.

Edward S. Piggins,
Circuit Judge.

APPENDIX "C"

Minority and Majority Opinion of the Michigan Supreme Court

Before the Entire Bench.

O'HARA, J.

The question presented in this case is whether a city which vacates dedicated streets and alleys in which private utilities have previously been granted the right to maintain their facilities and requires the removal thereof and reinstallation in other streets and alleys, has exercised its reasonable right of regulation under its police power or has taken private property without compensation.

The trial court in a considered and fully documented opinion held:

> "This court holds that the action of the city in directing the removal of the respondents' utility installations without compensation, under the circumstances in this case, exceeds the city's authority to exercise its police power and is a violation of the constitutional guarantees of the respondents. It is beyond the scope of regulation. It is an actual taking of private property for which just compensation must be paid. The decision on these issues being controlling, it is unnecessary to discuss the others raised by the parties."

The city appealed. Exhaustive briefs were filed and forceful argument advanced on behalf of the parties. An *amicus curiae* brief on behalf of the Michigan Association of Municipal Attorneys is acknowledged.

The facilities in question have in fact been removed and reinstalled, but under an express reservation of the right of the utilities to be compensated for the stipulated non-

betterment cost of removal and reinstallation. The facts as well as statements of position have been stipulated. The trial court succinctly set forth the factual background and we quote from his opinion:

> "The issues in this case are framed from an agreed stipulation of facts. They are as follows:
>
> "Undertaking to redevelop an area within its corporate boundaries designated as 'West Side Industrial Project, UR Mich. 1-4,' the city of Detroit hereinafter referred to as the city, on July 9, 1957, through its common council and pursuant to the provisions of Act 344 of P.A. 1945 as amended by CL 1948, 125.71 *et seq.*, which authorizes the rehabilitation of blighted areas and prescribes the method of accomplishment, adopted and approved a redevelopment plan and directed the institution of the necessary condemnation proceedings. The estimated net costs of the project after deduction of the estimated proceeds from the private sale of some of the land was $5,221,000. On November 14, 1957 the city entered into a loan and grant contract with the United States government pursuant to Title I of the Federal Housing Act of 1949 whereby the government would assist in financing the project by contributing two-thirds of the net cost to the city's one-third. It is pertinent to note the federal regulations, Urban Renewal Manual, Book I, Section 11-1-2 provides 'Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State and local law. If the L.P.A. (Local Public Agency— in this case the city) is required to compensate the utility company for proposed changes, the necessity for making the changes and the basis used in computing the estimated amount of such compensation shall be described. A legal opinion as to the obligations of the L.P.A. to provide the

compensation indicated shall be provided with Part I of the application for loan and grant.' The removal or relocation costs of the utility lines of private utilities was not included in the application although such costs for municipally owned utilities (public lighting and water) were included. The development plan of rehabilitation called for, among other things, the vacation of certain plats, streets and alleys, and the rerouting of certain utilities to other streets and alleys. The respondents, Michigan Bell Telephone Company, hereinafter referred to as Bell, and the Detroit Edison Company, hereinafter referred to as Edison, maintained installations in certain of the streets and alleys which were to be vacated. The city successfully completed its condemnation proceedings to which neither Bell nor Edison were named as parties. On February 20, 1959 the instant vacation proceedings were instituted in accordance with the provisions of the Plat Act, Act 172 PA 1929 as amended by CL 1948, 560.1 to 560.79 inclusive, which provides for the altering and vacating of plats and among other things, the reservation of easements for utilities in vacated streets and alleys. Both Bell and Edison appeared and objected insofar as the proposed vacations affected streets and alleys in which their installations were located, unless easements were reserved for them in these same streets and alleys or unless the city agreed to bear the cost of the removal and relocation of their installations to the new areas to be designated in the redevelopment plan. It should be noted that although the installations of each utility were differently located, the legal principles involved are the same. A controversy developed and on June 18, 1959 pursuant to an understanding between the parties which recognized and preserved the right to further judicial determination, an order of vacation was entered by the Hon. Robert M. Toms, this Court's predecessor, which contained the following provisions: 'Provided, however, that there is hereby

reserved in the streets and alleys above described, for the use of public utilities, easements for the maintenance of the utility poles, wires and equipment as presently located; provided always that this paragraph of this order is interlocutory and is subject to further final order, to be entered after proofs and arguments.' Following the entry of this order the facilities of both Bell and Edison were removed by agreement. Bell has maintained installations in this area since 1907 pursuant to Act 129, PA 1883 as amended by CL 1948, §484.1 to 484.10 inclusive, which provides further that its installations serve not only this area but the areas beyond. Similarly, Edison has maintained facilities serving this area and areas beyond as authorized and required by the properly and legally adopted ordinances of the City of Detroit. The development plan for rehabilitation involves some 73 acres of land containing some 424 structures, which land has to be acquired and the structures demolished. It provides for street widening and paving, installation of walks, sewers and water mains, creation of a public park, rezoning, vacation of certain plats, streets and alleys, rerouting of utilities and the sale of large portions of the land to private persons and corporations for light industrial and commercial uses. It is agreed that the nonprofit, nonbetterment costs of removal and relocation amounts to $11,305 in the case of Bell and $1,746.36 in the case of Edison. The city contends that the utilities pay these costs. The utilities contend that the city should pay."[*]

While the 2 utilities acquired their rights to use the streets and alleys of appellant-city by different means, it is stipulated their rights for the purpose of this case are identical.

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[*] The stipulation entered into by the parties recites that the parties "are aware of the precedential value of this case in governing utility relocation costs in other development projects, pending or planned, the magnitude of which is admitted by both parties to be many times in excess of the sum involved herein."

In arriving at his conclusion the trial judge postulated 4 propositions. First that the city was here engaged in a governmental as distinguished from a proprietary function. While we do not consider the proposition essential to decision, we agree. The statute** under which the city condemned the property involved declares the purpose to be accomplished "a public purpose and a public use." For us to hold otherwise we would have to declare the statute unconstitutional. Urban renewal has been declared a function of government by the legislature and the power to accomplish it has been properly delegated to the city. We find no merit in the distinction here urged by appellees. Incident to this claim it is also contended by appellees that because part of the land condemned by the city and otherwise acquired by it is to be subdivided and resold, the project loses its governmental character. The claim is not tenable. This precise point is controlled by our prior holding in *In re Slum Clearance,* 331 Mich 714 at p. 721:

> "To remove health, crime and fire hazards by slum clearance, is clearly a proper and reasonable exercise of the police power. * * * the fact that under the subsequent rehabilitation or restoration, the cleared area * * * passes into private hands to private property is an incident which does not change the nature of the slum clearance * * *."

This rule in our jurisprudence is amply supported by other holdings, State and Federal.

The second proposition held by the trial court as controlling is that upon acquisition and exercise by a utility a

** PA 1945, No. 344, as amended by PA 1957, No. 296 (CL 1948, §125.71 *et seq.*, as amended [Stat. Ann. 1958 Rev. §5.3501 *et seq.*]).

franchise becomes a vested property right, in the nature of a contractual right protected by Federal and State constitutional guarantee. So it does. The proposition is well settled. *City of Niles v. Michigan Gas & Electric Co.*, 273 Mich 255 (262). This rule, however, in this State and nationally, is subject to variations and modifications, general and specific, which render the broad statement as such incomplete. The rights acquired are dependent upon the nature of the original grant and any reservations therein. Even when acquired and exercised these rights are subordinate to the rights of the municipality in the reasonable exercise of the police power as delegated to it by the sovereignty—the State. Assuming the city here had contracted away this superior supervisory control, the action would have been a nullity. Municipalities cannot contract away their governmental obligations. The right of control over the utilities in the exercise of their franchises, contracts, or vested rights, whatever name given them, abides in the city. This rule becomes the more important as we continue to examine the development of the trial court's rationale.

Proposition III of the able trial judge's 4-point basis for his conclusion is that there are limitations upon the city's exercise of the police power over private property—and specifically private property in the nature of the franchise rights hereinbefore mentioned. No party to the proceedings contests this principle, and there is no point in discussing it. Like many general rules, however, this too is subject to the requirement that the exercise of the police power be "reasonable." Here we enter the area of specifics which in every case calls for a judicial determination of the meaning of "reasonable" under the particular facts of a given case. Such determination in this case need not

be made because at this point proposition III and the last of the trial court's premises merge and present a combined question. The judge rhetorically asks in point 4:

> "Is what the city proposes here a valid exercise of regulatory police power or is it an unconstitutional taking of property?"

This is the core of the matter and we think the question encompasses the whole issue. All that is needed is a more precise delineation of the meaning of the phrase *"what the city proposes here."* We construe the phrase to mean the act of vacating the streets and alleys. There can be no doubt that as to the combined question the answer must be in the affirmative. The city is empowered by statute to do just exactly what it did. Its right so to do is prescribed in PA 1929, No. 172, §62 (CL 1948, §560.62, as amended by PA 1958, No. 101 (Stat Ann 1963 Cum Supp §26.492)) which provides:

> "If the petition [to vacate] * * * involves the vacation of any alley, street, or other public place then being used by any public utility for public utility purposes, *it is hereby deemed necessary for the health, welfare, comfort and safety of the public to reserve an easement therein for the use of public utilities* * * * including a situation where a public utility is not then making an actual use of the area to be vacated." (Emphasis supplied.)

Here we believe is where the issues became confused. Appellees' rights did not become involved in the exercise of the delegated police power through the power of eminent domain granted to the city by the legislature for use in acquiring real property, or any rights in property under the urban renewal act. Strictly speaking, that statute with its delegation of power to the municipality in the nature

of the right to condemn private property for a legislatively declared public purpose, is not here involved. As the stipulation sets forth:

> "The purpose of *this* proceeding is to adjudicate and determine whether the city of Detroit is entitled to *have streets and alleys vacated in this proceeding without reservation of easements for existing public utilities' facilities or payment of relocation costs* * * *." (Emphasis supplied.)

Quite patently the alleys and streets wherein the equipment of appellees was located did not have to be condemned for the city to acquire control over them. These streets and alleys which ran through the whole blighted area to be rehabilitated, the city already owned.

The relative rights of the utilities and the city are to be found in the statute hereinbefore set forth which authorized the vacation of plats through which dedicated streets and alleys ran.

It would seem, short of disregarding completely the foregoing statute, the position of appellant-city cannot be sustained and the trial court reversed. We are asked to adjudicate and determine whether the city is entitled to have streets and alleys vacated in this proceeding without reservation of easements for existing public utilities. We are constrained to answer "no," because the applicable statute says "*no.*" The parties having stipulated that if this be our finding—the facilities having already been removed and the easements not reserved—the damage should be in the amounts agreed upon by the parties. The trial court ordered the payment thereof. His order must be affirmed.

By our decision here we would not be understood to dilute in any degree, nor modify by any implication herefrom the obligation of a public utility to remove, relocate and reinstall its facilities, at its own expense, within streets where easements have been acquired, when a public purpose requires. We leave unaffected by our decision here the principle enunciated in *New Orleans Gas Light Co. v. Drainage Commission of New Orleans,* 197 US 453 (25 S Ct 471, 49 L ed 831), and the cited cases following its rule. The principle there enunciated of the retained police power of the municipality is not here involved. Our holding is based upon the statute hereinbefore quoted which expresses a clear legislative intent to distinguish between that class of case dealing with removal, relocation and reinstallation of utility facilities in a specific street, or under certain circumstances from one street to another *where vacation of a street or an alley in which a utility easement has been acquired is involved and one in which the street is not vacated.*

It seems to us that the question we are urged by both parties to answer judicially, namely, whether the vacation of a dedicated street or alley with the attendant requirement of the removal of utility facilities without reservation of an easement therefor constitutes an unlawful taking of private property, or an exercise of regulatory control has been legislatively answered by the statutory mandate that the easement be reserved. Unreserved, the extinguishment thereof without compensation would constitute an unauthorized taking of private property. This question was saved for review because, as noted by the trial judge, when the vacation proceedings were instituted by the city, "both Bell and Edison appeared and objected insofar as the proposed vacations affected streets and alleys in which

their installations were located, unless easements were reserved for them in these same streets." The controlling legislative enactment is consistent with the general principle underlying this whole controversy. The rule was clearly stated in *In re Brewster Street Housing Site*, 291 Mich. 313 (342):

> "Where property is taken for public health and safety, it cannot be taken without compensation, and there is no distinction between the power of eminent domain and the police power in this regard. Russell, Police Power of the State, p. 86. In this case, the legislation involved is upheld under the police power of the State. But, if private property is to be taken for the purpose of carrying out the project in question, such property may be acquired against the will of its owner only by the exercise of the power of eminent domain. The power of eminent domain may be lawfully resorted to when authorized by the legislature to take the property of private individuals for purposes justifiable only under the police power of the State."

The inclusion of the traditional words accompanying an exercise of the police power in the statute requiring the reservation of utility easement, viz., *"it is hereby deemed necessary for the health, welfare, comfort and safety of the public to reserve an easement therein for the use of public utilities"* leave no doubt as to the public policy of the State.

For the reasons herein set forth the order of the trial court is affirmed. No costs, a public question being involved. (Justice Dethmers concurred with Justice O'Hara. Justice Black concurred in the result.)

APPENDIX B

Majority Opinion of the Michigan Supreme Court rendered February 2, 1965

Before the Entire Bench

SMITH, J. (For reversal)

After acquiring by eminent domain approximately 73 acres of lands and buildings for redevelopment purposes under the rehabilitation of blighted areas act (hereinafter referred to as the RBA act), PA 1945, No. 344, as amended (CL 1948 and CLS 1961, §125.71 *et seq.* [Stat. Ann. 1958 Rev. and Stat. Ann. 1963 Cum. Supp §5.3501 *et seq.*]), the City of Detroit instituted these proceedings in separate suit to vacate certain plats and streets and alleys pursuant to a development plan. These proceedings to vacate were brought under sections of the plat act, PA 1929, No. 172, §59 *et seq.*, as amended (CL 1948 and CLS 1961, §560.59 *et seq.* [Stat. Ann. 1953 Rev. and Stat. Ann. 1961 Cum. Supp. §26.489 *et seq.*]). The utilities, Michigan Bell and Detroit Edison, objected to vacation of certain streets and alleys in the blighted area in which their facilities were installed unless "easements" were reserved "to maintain their poles, wires and other equipment in their present locations in such streets and alleys." In lieu thereof, the utilities sought costs from the city for relocating such facilities to other places in the development area as designated in the plan.

As part of said development plan are three maps comprising part of Exhibit A and denominated 7, 8 and 9. These maps show graphically the elaborate planning performed by the City of Detroit to provide for both overhead and underground utility facilities in the area under redevelopment. From the maps it is plain that use of exist-

ing as well as new facilities was projected. The maps also indicate the utilities themselves as the source of at least some of the planning. It is not claimed by the utilities that relocation of facilities to other designated places within the redevelopment area will interfere with their obligations to serve customers either in the development area or beyond. The stage is set, therefore, for the crucial question. Is the city required to pay the utilities relocation costs?

The opinion of Mr. Justice O'Hara, affirming the trial court judgment, is grounded upon a construction of the plat act. We counter this rationale herein, although other points in his opinion might be considered more dispositive of the case, had he written for reversal as we do. Both utilities advert to the plat act in a manner as follows. Michigan Bell says that, although the trial court did not reach the proposition, it is entitled to prevail "for the additional reason" that the plat act requires reservation of "easements" and, Michigan Bell adds, that in lieu thereof it is entitled to reimbursements for the costs of relocation. In similar, but even briefer statement, Detroit Edison asserts that reservation of the "easements" is required under the act; however, it does not assert in its brief that alternatively relocation costs are required by the act. Significantly, the act itself makes no mention of relocation costs.

Mr. Justice O'Hara says that "strictly speaking" the rehabilitation of blighted areas act is not involved, only the plat act. However, both utilities say that the RBA act is involved, at least to some extent. Our conclusion is that both acts must be construed together as statutes *in pari materia*, for reasons which follow.

Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule

that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. Rathbun v. State of Michigan, 284 Mich 521; Palmer v. State Land Office Board, 304 Mich 628; Wayne County v. State Department of Social Welfare, 343 Mich 475.

There is no gainsaying that the rehabilitation of blighted areas act and the plat act, in pertinent parts, are statutes *in pari materia*. In the RBA act, one of the characteristics of a blighted area is defined as part of a municipality in which there is an improper division or arrangement of lots and ownerships and streets and other open spaces. This suggests, among other things, the necessity for vacating streets, etc., when the occasion demands. Further on in the act, reference is made to "easements" for sewers, public lighting, water, gas, or other similar utilities. Still further, in reference to a development plan the act provides that:

> "The plan shall designate the location, extent, character and estimated cost of the improvements contemplated for the area; and may include any or all of the following improvements:
>
> "Partial or total vacation of plats, or replatting; opening, widening, straightening, extending, vacating or closing streets, alleys or walkways; locating or relocating water mains, sewers, or other public or private utilities." CLS 1961, §125.74 (Stat. Ann. 1958 Rev. §5.3504).

So much for references to the RBA act. Then compare this with pertinent sections of the plat act. Circuit courts are authorized upon proper application, to alter or vacate;

and to correct or revise plats. Vacation, if objected to, must be shown to be necessary for the "health, welfare, comfort and safety of the public", the act reads. Then on to that crucial portion of the plat act upon which Mr. Justice O'Hara plants his opinion.

> "If the petition before the court involves the vacation of any alley, street or other public place then being used by any public utility for public utility purposes, *it is hereby deemed necessary for the health, welfare, comfort and safety of the public to reserve an easement therein for the use of public utilities,* and it is hereby confirmed that the court has the authority to reserve such an easement. The foregoing provision shall not be deemed to limit the authority of the court to reserve easements for the use of the public utilities in other cases required or consistent with the health, welfare, comfort or safety of the public, including a situation where a public utility is not then making an actual use of the area to be vacated." (CLS 1961, §560.62 [Stat. Ann. 1963 Cum. Supp. §26.492]). (Emphasis supplied.)

From reviewing pertinent parts of the two statutes, it would appear that at least insofar as vacation of plats, streets and alleys is concerned, the statutes relate to the same general subject. It might be said that by the RBA act, we are directed to several conditions under which vacations should be accomplished, whereas the plat act gives the tool, or shows how it may be accomplished. We conclude, therefore, that the statutes are *in pari materia* and should be so construed.

When construed together, we hold that the statutes do not require, in circumstances such as these, a municipality to reserve "easements" in streets and alleys sought to be vacated. It is true, as Mr. Justice O'Hara suggests, the

plat act provisions seem to require reservations of "easements", in place, for utility purposes where previously so used. However, strict construction of a statute should not be followed where such construction would defeat the main purpose of other statutes relating to the same subject. Rathbun v. State of Michigan, *supra*.

The Rathbun Case involved, *inter alia,* an interpretation of supposed conflicting provisions of the general property tax act (Section 131 of Act No. 206, PA 1893, as amended)[1] and the public domain act (Act No. 280, PA 1909 as amended).[2] Plaintiff's grantor had claimed that the reservation of mineral rights to the State in a homestead deed was contrary to the general property tax law which provided that "Such deed shall convey an absolute title to the lands sold." Holding the statutes to be *in pari materia,* this Court ruled that the later enacted public domain act did not amend or repeal the general property tax law. The public domain act was said to indicate a growth of general public policy with regard to the conservation of resources and, therefore, that the State acted properly in severing "absolute fee in the surface rights from the absolute fee in the mineral rights." In the law related to statutory construction the case is cited, and properly so, for at least these two general propositions: (1) statutes will be construed if possible so that other statutes relating to the same subject may be given effect; and (2) strict construction of a statute should not be followed where it would defeat the main purpose of other statutes relative to the same subject. Of similar holding is Auditor General v. Stevens, 291 Mich 658, wherein certain tax moratorium

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[1] See CL 1948, §211.131 (Stat. Ann. 1960 Rev. §7.188)

[2] See CL 1948, §322.202 *et seq.* (Stat. Ann 1958 Rev. §13.431 *et seq.*)

statutes were harmoniously construed *in pari materia* with statutes comprising parts of the general tax law. To hold that in every single instance the plat act requires in vacation proceedings a reservation of "easements", in place, for public utilities is to place an unduly strict interpretation upon plat act provisions and also is to ignore basic differences between comprehensive redevelopment planning, on the one hand, and isolated instances of street and alley vacation, on the other. The former involves fundamental redesign of an entire area, including utility service facilities. In such case many utility facilities are, as here, retained. Other facilities may need to be redesigned to serve new customers with new service demands in the redeveloped area; while yet other facilities may have to be re-routed, if service is to be provided new customers in new locations at convenient outlets. We may say, therefore, that for comprehensive redevelopment planning under the RBA act, provisions are made for both the creation and the retention, where necessary, of places in the public right of way for utility facilities. On the other hand, where no broad area redevelopment is pursued under the RBA act, or similar statutes, and, hence, there is no requirement, statutory or otherwise, for comprehensive facility redesign or re-routing, it seems that in an isolated instance of street or alley vacation some provision may need to be made for retention of space in the vacated public right of way for utility facilities, to insure continuity of service. This is what the reservation of "easements" in the plat act is intended to provide. We hold that under present circumstances, "easements" were not required to be reserved. If such were not required, then the city, under its stipulation with the utilities, is not required to pay relocation costs.

One thing more needs to be said. Justice O'Hara writes that reservation of an "easement" is required because the plat act says so, and if "unreserved, the extinguishment thereof without compensation would constitute an unauthorized taking of private property." Holding, as we do, contrary to Justice O'Hara's premise that the plat act requires, under the circumstances, reservation of "easements", the conclusion follows that if no reservation is required then the refusal to reserve cannot be considered extinguishment of the easement. Refusal to grant a nonexistent right does not constitute an extinguishment.

It should be added that this decision should not be construed as ordaining payment of relocation costs in lieu of "easements", as such may be required by language of the plat act. This question was not presented. We take note simply of the fact that the plat act contains no express provision for payment in lieu of reservation.

We are in substantial agreement with those portions of Mr. Justice O'Hara's opinion wherein he discusses propositions I, II, and III. It is his discussion of the fourth point or proposition with which we disagree, especially as he interprets and applies aforementioned vacation provisions of the plat act.

We vote for reversal. No costs, a public question being involved.

(Chief Justice Kavanagh and Justices Kelly and Souris concurred with Justice Smith.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 497

MICHIGAN BELL TELEPHONE COMPANY,
Appellant,
vs.
CITY OF DETROIT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

Appellee, pursuant to Rule 16, moves this Court to dismiss the appeal on the ground that the judgment rests on an adequate non-Federal Basis.

STATEMENT

The City of Detroit undertook the rehabilitation of a blighted area, known as the West Side Industrial Project, pursuant to Act 344 of the Public Acts of 1945, as amended, (Mich. Comp. Laws, §§125.71 *et seq.*; Mich. Stat. Ann. §§5.3501, *et seq.*). The Development Plan for the rehabilitation of this blighted area provided, among other things, for the acquisition by the City of approximately 73 acres of land containing 424 structures, the demolition of these structures, street widening and paving, the installation of sidewalks, sewers and water mains, rezoning, the vacation of certain streets and alleys, and the rerouting of certain utilities to other streets and alleys provided in the Development Plan. Streets and alleys in which Appellant had equipment were sought by the City to be vacated in carrying out the Development Plan. Appellant claimed from the City the costs of relocating its equipment from the vacated streets and alleys to other streets and alleys in the development area. The Michigan Supreme Court disallowed its claim and held in favor of the City.

ARGUMENT

THE JUDGMENT OF THE MICHIGAN SUPREME COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In undertaking the rehabilitation of this blighted area under Act 344, *supra,* the City of Detroit was engaged in a governmental function providing for the protection of the public health, safety, morals and general welfare. The correction of outmoded street patterns and alleys and the relocation of utilities therefrom was an essential part of the Development Plan. *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

Appellant maintained its facilities in these streets and alleys subject at all times to an obligation to relocate at its own expense whenever the City undertook a function which was necessary to protect the public health, safety, morals and general welfare.

Berman v. Parker, supra;
New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 195 U.S. 453, 25 S.Ct. 471, 49 L. Ed. 831 (1905);
New York Tunnel Authority v. Consolidated Edison Co., 295 N.Y. 467, 68 N.E. 2d 445 (1946);
First National Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A.2d 699 (1957);
The Port of New York Authority v. Hackensack Water Company, 41 N.J. 90, 195 A.2d 1 (1963);
Detroit Edison Company v. Detroit, 332 Mich. 348, 51 N.W. 2d 245 (1952).

The application of the rule stated in these cases is not confined to relocation within the same streets and alleys, but is equally applicable when streets and alleys are vacated.

Scranton Gas & Water Co. v. City of Scranton, 214 Pa. 586, 64 A. 84 (1906);
Southern Bell Telephone and Telegraph Company v. State of Florida, 75 So. 2d 796 (1954);
Department of Highways v. Southwestern Electric Power Co., 243 La. 564, 145 So. 2d 312 (1962);
City of Baltimore, et al. v. Baltimore Gas and Electric Company, et al., 192 A. 2d 87 (1963).

Appellant's right to use the streets and alleys of the City of Detroit was not abrogated. The Development Plan

provided another public place in which Appellant could and did relocate (Appellant's Appendix B, Pages 47 and 48.)

Appellant treated the statute in question only incidentally in the Michigan Supreme Court. In its Opinion, the Court stated (Appellant's Appendix B, Page 48):

> "The opinion of Mr. Justice O'Hara, affirming the trial court judgment, is grounded upon a construction of the plat act. We counter this rationale herein, although other points in his opinion might be considered more dispositive of the case, had he written for reversal as we do. Both utilities advert to the plat act in a manner as follows. Michigan Bell says that, although the trial court did not reach the proposition, it is entitled to prevail 'for the additional reason' that the plat act requires reservation of 'easements' and, Michigan Bell adds, that in lieu thereof it is entitled to reimbursements for the costs of relocation. In similar, but even briefer statement, Detroit Edison asserts that reservation of the 'easements' is required under the act; however, it does not assert in its brief that alternatively relocation costs are required by the act. Significantly, the act itself makes no mention of relocation costs."

Wherefore, Appellee prays that the appeal be dismissed.

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Dated: September 13, 1965.

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REPLY BRIEF FOR THE APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 497

In the Matter of the Petition of the City of Detroit for the Vacation of Certain Plats, Streets and Alleys

MICHIGAN BELL TELEPHONE COMPANY,
Appellant,
vs.
CITY OF DETROIT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS

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Appellant, Michigan Bell Telephone Company, for its reply to the "Motion To Dismiss" filed by the City of Detroit, Appellee, respectfully represents that the Michigan Supreme Court judgment which is the subject of appeal necessarily decided the Federal constitutional issue presented by Appellant and there is no other substantive or adequate non-federal basis for sustaining the decision.

The minority opinion posed the question: "Is what the city proposes here a valid exercise of regulatory police

power or is it an unconstitutional taking of property?" (Jurisdictional Statement, pg. 43.) The majority opinion of the Court disagreed with the reasoning of the minority and held that the city did what the two statutes involved permitted. In so ruling the majority of the Court concluded "that the statutes are *in pari materia* and should be so construed." (Jurisdictional Statement, pg. 50.)

The Michigan Supreme Court Erroneously Approved and Authorized an Unconstitutional Taking of Appellant's Property

This proposition seems apparent. The City of Detroit made the attempt to evade and avoid the mandatory provisions of Act 344, PA 1945 as amended, (CL §125.71, et seq., MSA §5.3501, et seq.) and the federal constitutional guarantees. It did not join Appellant in the condemnation proceedings to acquire the property involved. After completing the condemnation proceedings as filed the City then proceeded under the Plat Act (Act 172 PA 1929, as amended by Act 101 PA 1958, MSA 1963, Supp. 26.492) to vacate the streets and alleys. By the latter proceeding it sought to eliminate Appellant's vested property rights without compensation. This the Michigan Supreme Court has approved and authorized through strained construction and interpretation of the statutes and denial of the federal constitutional guarantees.

By Sec. 3 of Act 344, the city is granted the power to *"acquire real property by purchase, gift, exchange or condemnation."* By Sec. 2, "real property" shall include *"all easements, franchises * * *, and every estate interest, privilege, easement, franchise and right therein, or appurtenant thereto, legal or equitable, including rights of way."* By Sec. 4(c) it is mandatory that "costs" include *"locating or relocating water mains, sewers, or other public or private utilities"* (emphasis supplied).

It is apparent that neither Act 344 nor the Plat Act authorizes the course of action employed by the city in attempting to eliminate the property rights of appellant without compensation. In the absence of Act 344 the city could not acquire or eliminate any property rights for the purposes there set forth. Under the statute it is expressly provided that the city's sole power and authority is to "acquire" property rights for such purposes *"by purchase, gift, exchange or condemnation"* which requires payment of compensation (emphasis supplied).

By strained construction of both statutes particularly the Plat Act; and notwithstanding the clearly expressed provisions of Act 344 the majority opinion of the Michigan Supreme Court reaches an unconstitutional result in permitting the city—

(a) to include in the "estimated cost of the improvements" the city's costs of "locating and relocating water mains and sewers, and to arbitrarily and unilaterally exclude from such costs the costs of "locating and relocating * * * other private or public utilities."

(b) to eliminate and destroy (not acquire) the property rights of utilities without "purchase" or "condemnation."

We submit that *if* the statutes *properly construed and applied* authorize what the Michigan Supreme Court has approved, then the statutes are unconstitutional. If these statutes do not authorize such result, then the Court's interpretation results in an unconstitutional taking and is an adverse decision on the constitutional issue.

Under any interpretation of the majority decision of the Michigan Supreme Court a most fundamental federal constitutional issue is presented by this appeal. The decision is contrary to long established law. The Court did not men-

tion or reveal any intention to modify or reverse its unanimous decision in *In Re Brewster Street Housing Site*, (1939) 291 Mich. 313, 342, where it was said:

> "Where property is taken for public health and safety, it cannot be taken without compensation, and there is no distinction between the power of eminent domain and the police power in this regard."

None of the cases cited by the city in its motion involved a vested property right taken without compensation under statutes containing provisions such as Act 344 and the Plat Act. None of the cases go as far as the decision of the Michigan Supreme Court here involved which authorizes the taking of property under the guise of police power regulation. Such is not regulation. It is confiscation.

CONCLUSION

For the reasons stated the Motion to Dismiss should be denied and the judgment below reversed.

Respectfully submitted,

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